



Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments)	
FM Broadcast Stations)	
(Presque Isle, Michigan))	MB Docket No. 02-106
)	RM-10416
)	
(Harrisville, Michigan))	MB Docket No. 02-108
)	RM-10418

To: Assistant Chief, Audio Division

OPPOSITION TO MOTIONS TO STRIKE

Northern Michigan Radio, Inc. ("Northern"), hereby opposes the motions to strike (the "Motions")¹ filed August 7, 2002 by Northern Paul Bunyan Radio Company ("NPBRC") and directed to Northern's July 25, 2002 Supplement to the Counterproposal Northern filed in the captioned proceedings on July 8, 2002. The Motions should be denied for the following reasons:

Procedural Setting

Northern's Counterproposal was timely filed on July 8, 2002 in response to the *Notice of Proposed Rule Making*, DA 02-1159 (released May 17, 2002) ("NPRM"), in the Presque Isle and Harrisville proceedings. The Counterproposal has not been accepted for filing through issuance of a public notice inviting reply comments. Nevertheless, the NPBRC filed its Motions arguing that Northern had not included the requisite pledge with respect to constructing and operating on the channel it proposed as a substitute for Channel 223C1 at Atlanta, Michigan,

¹ NPBRC filed two identical Motions, one in the Presque Isle proceeding (MB Docket No. 02-106) and one in the Harrisville proceeding (MB Docket No. 02-108). This Opposition is directed to both Motions.

which is occupied by Northern's Station WBYC. Immediately thereafter, and before any public notice was given of it's the Counterproposal, Northern filed its Supplement making the necessary pledge. In an accompanying Motion for Leave to File,² Northern showed that no prejudice would result from acceptance of the Supplement because the Counterproposal was technically complete when filed, and it had not yet been made subject to public comment. Indeed, NPBRC and any other interested party will have an opportunity to comment on the Counterproposal, as supplemented, as soon as public notice of acceptance is issued. This is the situation even though NPBRC already has prematurely filed two sets of reply comments (on July 23) directed to Northern's Counterproposal.

In its Motions, NPBRC argues that the Counterproposal should be rejected because it was not technically correct and substantially complete at the time of filing and because, it claims, there is no provision in Section 1.415 of the rules allowing the filing of such supplements.

The Counterproposal Was Technically Correct and Substantially Complete

The Counterproposal, as filed July 8, 2002, included complete and correct engineering data showing full spacings for the channel substitutions (at Presque Isle, Harrisville and Atlanta, Michigan) and the first-service drop-ins (at Vanderbilt, East Tawas and Ossineke) that were proposed. Community data was included for each of the three first local service proposals and legal showings were made as to why the Counterproposal represents a preferential allotment scheme when compared to the *NPRM's* single-channel proposals for Presque Isle and

² NPBRC states that Northern failed to request leave to file its Supplement. Motions, page 2. This is incorrect. A copy of Northern's Motion for Leave to File, submitted simultaneously with the Supplement, was filed with Secretary's Office on July 25, 2002 and served on counsel for NPBRC.

Harrisville.³ The Counterproposal also included pledges by Northern to apply for, construct and operate new stations at East Tawas and Ossineke. This was a technically correct and substantially complete counterproposal. The only issue is whether it was too late, after July 8, for Northern to supplement its proposal by filing its pledge to apply for and construct on the substitute channel at Atlanta.

The Supplement May Be Accepted Because No Prejudice Will Result

NPBRC, citing *Albion and Columbus, Nebraska*, 8 FCC Rcd 2876 (1993), and *Llano and Marble Falls, Texas*, 12 FCC Rcd 6809 (1977), argues that the initial omission of the Atlanta pledge is fatal to the Counterproposal. Motions, pp. 4-5. NPBRC is wrong. While the pledge is important, its absence on the counterproposal deadline did not render the Counterproposal defective. Administratively, it is not disruptive for the FCC to receive such a non-technical supplement. No cut-off rights are affected because the Counterproposal was technically complete on the date it was filed. Indeed, in its Supplement Northern is not proposing a new community, supplementing its proposal to cure an engineering error or making any other change that would introduce uncertainty as to the technical aspects of the proposal as of the deadline set in the *NPRM*. Technical review of the Counterproposal could have begun as of July 8. Legal review, on the other hand, will not begin until after the Counterproposal is placed on public notice and the 15 days allowed for comments have passed. Thus, NPBRC and other parties have not been deprived of their opportunity to comment on the Counterproposal, and no disruption or prejudice will result from its acceptance.

³ These communities also are accommodated with new channels in the Counterproposal.

NPBRC cites no case where the omission of an expression of interest or a construction pledge, as opposed to a technical error or insufficiency, resulted in the dismissal of a counterproposal. Nor does it cite any case where such a minor non-technical amendment was rejected, and a counterproposal dismissed, when the curative amendment was submitted before the public notice and comment period even had begun. The additional pledge is more like the late-filed expression of interest permitted in *Sulphur and Fort Polk, Louisiana*, 10 FCC Rcd 4952, nt. 5 (1995), or the late-filed reimbursement pledge permitted in *Boalsburg, Pennsylvania, et al*, 7 FCC Rcd 7653, 7654, nt. 7 (1992), than it is the disqualifying technical defects which rendered the counterproposals unacceptable in *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090, 2093 (1997), the case principally relied upon by NPBRC. Indeed, the proponent in *Boalsburg* received credit for its late-filed reimbursement pledge, which in the context of an allotment proposal is as important as an expression of interest, because, as is the case here, no prejudice to other parties would result. In accepting the pledge, the Commission noted, “We do not absolutely prohibit minor curative amendments.” *Boalsburg, supra*.

NPBRC’s request for rigid application of Section 1.415(d) of the rules is similarly misplaced. Northern’s Supplement was filed even before the pleading cycle began for its Counterproposal. Moreover, Northern’s curative amendment did not include untimely comments on the original Presque Isle and Harrisville proposals advanced by NPBRC, and it was accompanied by a Motion for Leave to File showing a valid public interest rationale for acceptance. The correction made by Northern, because it involves no change in its basic technical proposal, is likewise minor given the early stage at which it was submitted and the resulting lack of prejudice. It is the Commission’s practice to accept minor curative amendments

under those circumstances and Section 1.415 of the rules does not bar such acceptance. The Supplement should be accepted, and the Motions denied, on that basis.

WHEREFORE, These Matters Considered, It is respectfully requested that the Commission deny NPBRC's Motions to Strike and accept Northern's Counterproposal for filing

Respectfully submitted,

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By



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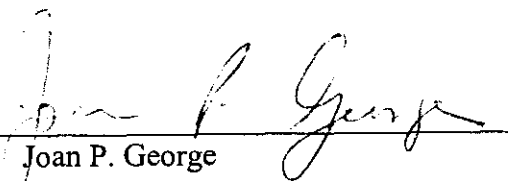
August 19, 2002

CERTIFICATE OF SERVICE

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that a true copy of the *Opposition to Motions to Strike* was sent this 19th day of August, 2002, by hand where indicated and via United States First Class Mail, postage prepaid, to the following:

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* By hand